No. 137, Original

IN THE

Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING AND
STATE OF NORTH DAKOTA,

Respondents.

On Motion to Dismiss Bill of Complaint

MOTION OF ANADARKO PETROLEUM CORPORATION FOR LEAVE TO FILE *AMICUS* BRIEF AND *AMICUS* BRIEF IN SUPPORT OF RESPONDENT STATE OF WYOMING

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RULE 29.6 DISCLOSURE STATEMENT

Anadarko Petroleum Corporation has no parent corporation, and no publicly held company owns ten percent or more of the corporation's stock.

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MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Anadarko Petroleum Corporation ("Anadarko") moves for leave to file the attached *amicus* brief in support of the Motion to Dismiss filed by Wyoming on April 4, 2008. On April 2, 2008, this Court extended the briefing schedule to provide that *amicus* briefs supporting Wyoming are due April 25, 2008.

Counsel for *amicus* contacted counsel for the parties, and have been advised that Wyoming consents to the filing of this brief; Montana does not consent to the filing; and North Dakota does not object.

This is an original action brought by Montana, alleging that Wyoming has breached the Yellowstone

River Compact ("Compact"). North Dakota is also a party to the case because it is a party to the Compact, but it appears to have no interest in this controversy.

Among other assertions, the Complaint alleges that Wyoming has violated Montana's rights under the Compact by "allow[ing] the pumping of groundwater associated with coalbed methane production in the Tongue and Powder River Basins . . .." Compl. ¶11. The Tongue and Powder Rivers flow from Wyoming into Montana, where they join the Yellowstone River. As tributaries of the Yellowstone River, they are covered by the Compact.

Anadarko is an independent oil and gas exploration and production company. It has extensive oil and gas leaseholds in the areas surrounding the Powder River in Wyoming. In order to develop these leaseholds, Anadarko engages in coalbed natural gas or "CBNG" production. Production of CBNG, also referred to as coalbed methane or "CBM," is a process whereby water is pumped from coal seams to free natural gas otherwise trapped in the coal. The CBNG process accounted for 9.4 percent of the natural gas production of this country in 2006, and that share is growing. *See* Judith Kohler, *Study begins on coal-bed methane water*, Caspar Star-Tribune Online, Apr. 9, 2008, http://www.trib.com/articles/2008/04/09/news/wyoming/9816566e6c8c75d8872574260001aefc.txt. *See also* Energy Information Admin., Coalbed Methane Proved Reserves and Production, http://tonto.eia.doe.gov/dnav/ng/ng_enr_cbm_a_EPG0_r52_Bcf_a.htm.

If Montana were to prevail, Anadarko's ability to produce natural gas from coal beds in the area of the Powder River could be adversely affected. Wyoming

does not adequately represent Anadarko's interests. A principal issue in the case is whether the Compact covers groundwater. Wyoming is seeking to protect all groundwater (including groundwater used for irrigation) from regulation under the Compact. While Anadarko agrees with Wyoming's position in this regard, Anadarko—as explained in the attached brief—also believes that water produced in association with CBNG would not be covered by the Compact even if the Court determines that groundwater generally may be covered. This is a significant point that Anadarko cannot rely on Wyoming to fully develop.

Anadarko has a "direct stake in this controversy," and its participation would contribute to "a full exposition of the issues" involved. *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981). In these circumstances, *amicus* participation is appropriate. *New Jersey v. Delaware*, 128 S. Ct. 1410 (2008) (citing *amicus* brief filed by BP America, Inc. and Crown Landing LLC).

Respectfully submitted,

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Dated: April 25, 2008

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AMICUS BRIEF IN SUPPORT OF RESPONDENT STATE OF WYOMING

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INTEREST OF THE *AMICUS*[1]

Anadarko Petroleum Corporation ("Anadarko") is an independent oil and gas exploration and production company. It has extensive oil and gas leaseholds in the areas surrounding the Powder River in Wyoming. Anadarko engages in the extraction of natural gas from coal seams in these areas, referred to as coalbed natural gas ("CBNG") or coalbed methane ("CBM"). That activity requires the pumping of water located in the coal seams to the surface. Paragraph 11 of Montana's Complaint specifically targets that pumping, which it alleges has caused a violation of the Yellowstone River Compact, 65 Stat. 663 (1951) ("Compact").[2]

STATEMENT

Montana alleges that Wyoming has allowed "the pumping of groundwater associated with coalbed methane production in the Tongue and Powder River Basins." Compl. ¶11. Montana alleges that Wyoming's action has "depleted and is threatening further to deplete the waters of the Tongue and Powder Rivers allocated to the State of Montana under Article V of the Compact." Compl. ¶13.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. Wyoming consents to the filing of this brief. Montana does not consent, and North Dakota does not object. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] The Compact is reprinted in the Appendix to the State of Montana's Bill of Complaint ("Compl. App.").

The coal reserves that underlie the Tongue and Powder River Basins are several hundred feet below the ground and contain extensive reservoirs of natural gas. The natural gas is trapped by groundwater that fills the interstitial areas of the coal reserves. Extraction of the natural gas is accomplished by drilling a conventional well into the coal seam and pumping the trapped water to the surface to reduce water pressure. This pumping releases the trapped natural gas, which is transported to the surface through a separate well bore, captured, and piped to market. The water pumped to the surface then may be either discharged to the surface or reinjected into the ground.[3]

The Ninth Circuit has held that CBNG groundwater extracted from coal seams underlying the Powder River Basin cannot be discharged into the Powder River without a permit under the Clean Water Act, 33 U.S.C. §§1251-1387. *N. Plains Res. Council*, 325 F.3d at 1161. That court rejected an argument that a permit is unnecessary because the CBNG process does not alter the discharged groundwater, reasoning that the discharge could affect the chemical integrity of the River into which it is discharged because "the [CBNG] water would not flow into the Tongue River but for [the company's] methane extraction processes." *Id.* at 1162. The Ninth Circuit concluded that the case was "practically indistinguishable" from cases holding that "transporting water from one water body to

[3] This description is largely taken from *Northern Plains Resource Council v. Fidelity Exploration & Development Co.*, 325 F.3d 1155, 1158 (9th Cir. 2003). While the court describes the CBNG process as it takes place in areas of Montana surrounding the Powder River, the description is accurate for Wyoming as well.

another can violate the [Clean Water Act]." *Id.* at 1163. The CBNG operator is not diverting groundwater from the river, if without the pumping it would not reach the river.

SUMMARY OF ARGUMENT

The Yellowstone River Compact was premised on the assumption that there would continue to be ample water in the Yellowstone River and its tributaries to supply pre-1950 needs, as well as future needs, if sufficient reservoirs were built. The Compact was written to facilitate construction of various water storage projects, and to allocate the surface flows of the River the drafters assumed would remain after existing uses (*i.e.*, pre-1950) were satisfied. That is why the Compact creates no new rights for existing users, instead leaving them to the rights they enjoyed under existing water law, and confines its allocative system to new uses. That is also why the Compact did not cover groundwater. The drafters did not envision that depletion of the Yellowstone River System would be a problem, and thus did not include an anti-depletion clause that, in other Compacts, has been the basis for a finding of groundwater coverage. Nor did they attempt to address in the Compact the entire water supply of the geographic areas covered by the Compact. Rather, they sought only to allocate the "unused and unappropriated" waters of the Interstate tributaries of the Yellowstone River (*i.e.*, the actual surface water flowing between the States) (Art. V.B), which they assumed would always remain available for allocation and would be sufficient to meet current and future needs.

The plain text of the Compact confirms the drafters' intent to limit its coverage to direct diversions of

surface water. The Compact's definition of covered waters is limited to the Yellowstone River itself, its tributaries, and springs and swamps. Art. II.D. Groundwater is not mentioned. The Compact's limits are confined to "diversions" from the surface flow of the river system, and the Compact's percentage allocations are based exclusively on surface flow. Art. V.B.

Even if the Compact could somehow be read to reach some groundwater, it should not be read to reach water extracted during the CBNG process. CBNG extraction involves the pumping of deep groundwater. Typically, without pumping, CBNG waters pumped from deep seams would not naturally reach the surface of the Powder River and be available for diversion in Montana. *See N. Plains Res. Council*, 325 F.3d at 1158 ("Because CBM water comes from deep underground aquifers, it would not reach the Tongue River were it not for [the company's] extraction process."). The pumping of CBNG waters that would not naturally reach the surface of a river flowing in Montana cannot form the basis of a valid Compact claim by Montana.

Montana relies exclusively on Article V.A—the Compact's only provision relating to pre-1950 rights. Article V.A, however, confers no rights under the Compact on pre-1950 users. Article V.A states only that pre-1950 rights "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." That plainly confers no rights under the Compact. Instead, Article V.B regulates and allocates post-1950 rights, and Montana asserts no violation of Article V.B. Its claim must therefore be dismissed.

ARGUMENT

I. THE YELLOWSTONE RIVER COMPACT DOES NOT COVER GROUNDWATER.

A. The Plain Language Of The Compact Does Not Cover Groundwater.

The State of Wyoming is correct in its contention that the Compact does not regulate groundwater use. The core of the Compact is Article V, and the key terms of that Article are defined expressly to include only surface water, in stark contrast to the language of other interstate-river compacts this Court has considered previously.

Article V.A preserves pre-1950 "*[a]ppropriative rights* to the beneficial uses of the water of the *Yellowstone River System*." Article V.B allocates "unused and *unappropriated* waters of the *Interstate tributaries* of the Yellowstone River" as of January 1, 1950. (Emphasis added). Such unused and unappropriated water is allocated first in such quantities as necessary to provide supplemental waters for pre-1950 rights, to be acquired and enjoyed "under the doctrine of appropriation." Art. V.B. The remainder is allocated to each State "for storage or *direct diversions* for beneficial use" according to specified percentages. *Id.* (emphasis added). The percentages vary according to the different rivers involved, with a different "point of measurement" for each river. *Id.* For each river and point of measurement, the quantity of water subject to the percentage allocations is the "quantity of water, in acre-feet, that passed the point of measurement," plus the "total *diversions* . . . above the point of measurement," plus the net change in storage above the point of measurement. Art. V.C (emphasis added).

This language describes a system that is solely focused on allocation of surface flow. That is confirmed by the Compact's definitions of "Yellowstone River System," "Tributary," "Interstate Tributaries" and "diversion." Article II defines these terms in a manner that is limited to the surface water of the rivers, including springs and swamps. None of the definitions can naturally be read to cover groundwater.

Thus "Yellowstone River System" is defined to mean "the Yellowstone River and all of its tributaries, including springs and swamps . . .." Art. II.D. "Tributary" means "any stream which in a natural state contributes to the flow of the Yellowstone River," and "Interstate Tributaries" means certain named rivers, including the Powder and the Tongue. Arts. II.E, II.F. The ordinary meaning of "stream" refers to the surface water of a river, and the drafters of the Compact included "springs and swamps" but included no reference to groundwater. Springs and swamps, like the rivers themselves, are at the surface, while groundwater is not. Thus, the waters that the Compact lists as covered share a common characteristic that groundwater lacks. The fact that "the items expressed are members of an 'associated group or series,' justifies] the inference that [an] item[] not mentioned [was] excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)).

The inference that the drafters did not exclude groundwater merely by "inadvertence" is particularly strong in light of the importance of groundwater. In 1947, just four years before the Compact was approved, Wyoming adopted its first comprehensive

statute regulating groundwater.[4] In these circumstances, the notion that the drafters intended to cover groundwater but inadvertently failed to include it in their list of covered waters is implausible.

Moreover, unlike Wyoming, Montana law at the time the Compact was adopted did not extend the doctrine of appropriation—which Article V.A of the Compact references as governing pre-1950 water rights—to groundwater. *See Ryan v. Quinlan*, 124 P. 512, 515-16 (Mont. 1912) ("It has been settled by a long line of decisions that percolating water is not governed by the same rules that are applied to running streams. . . . [T]he proprietor of the soil, where such water is found, has the right to control and use it as he pleases for the purpose of improving his own land, though his use or control may incidentally injure an adjoining proprietor."). *See also* R.C.M. 1947, c. 29, § 89-2901 (confirming right of landowner to sink wells). The differences between Wyoming and Montana law concerning groundwater regulation make it all the more unlikely that the drafters intended by their silence to somehow cover groundwater uses. That is particularly true given that all of the express terms of the Compact are limited to surface water.

Moreover, as noted, Article V preserves pre-1950 "appropriative rights" and allocates "unappropriated" water under the doctrine of "appropriation." *See* Part III *infra*. While the Compact does not explicitly define "appropriation" or "appropriative

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[4] 1947 Wyo. Sess. Laws ch. 107, discussed in Lawrence J. Wolfe & Jennifer G. Hager, *Wyoming's Groundwater Laws: Quantity and Quality Regulation*, 24 Land & Water L. Rev. 39, 43-45 (1989).

rights," another provision indicates that it refers to use of surface water. Article VII.C states that appropriations may be adjudicated "in the State in which the water is diverted," thereby making it clear that appropriations occur only when water is "diverted."

The Compact expressly defines "Divert" and "Diversion" as limited to surface waters. These terms are defined to mean "the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not *returned directly into the channel of the Yellowstone River or of the tributary from which it is it taken.*" Art. II.G (emphasis added). The taking of groundwater cannot be a "diversion"—and thus is not an "appropriation" or the exercise of an "appropriative right" under Articles V.A and V.B—because it does not involve taking water from *the channel* "of the Yellowstone River" or "of [a] tributary."

The Compact's system for allocation of post-1950 water confirms that the Compact does not reach groundwater. Article V.C provides that the quantity of water subject to the percentage allocations consists of the "total diversions, in acre-feet, above the point of measurement," plus net changes in storage and the water that passed the point of measurement. Moreover, Article V.B makes clear these allocations apply only to "waters of the Interstate tributaries," which are defined in Article II.F to include only certain enumerated rivers. Thus, on its face, the provision regarding allocation addresses surface waters only. As pointed out, the Compact defines "diversions" as a taking from the "channel." Art. II.G. And "diversions . . . above the

point of measurement" also is a clear reference to diversions from the river channel.[5]

In sum, the text of the Compact makes clear that the drafters were concerned solely with allocating the surface waters of the Interstate Tributaries of the Yellowstone River System.

B. The Precedents On Which Montana Relies Involved Compacts That Differ Significantly From The Yellowstone River Compact.

1. Republican River Compact.

Montana relies primarily on this Court's order denying Nebraska's motion to dismiss a complaint filed by Kansas alleging that Nebraska allowed groundwater pumping in the Republican River Basin in violation of the Republican River Compact. *Kansas v. Nebraska*, 530 U.S. 1272 (2000). The Court in that case did not articulate a reason for its decision denying the motion to dismiss, and thus the decision presumably relied on the Special Master's recommendation. That recommendation was based

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[5] Montana's legislation implementing the Compact requires any person claiming a post-1950 "appropriative right" to use waters of an interstate Yellowstone tributary, before diverting any water, to "install in his ditch or other means of diversion a weir or other measuring device." Mont. Code Ann. §85-20-105 (2007). Ditches are surface features, and a weir is a surface measuring device. This provision was passed to provide for "Administration of the Yellowstone River Compact." 1953 Mont. Laws 173. Had the drafters thought the Compact dealt with groundwater, they probably would have also required the measurement of pumped groundwater through a gauge on the pump. The statute's failure to mention any specific measuring device associated with groundwater confirms that the Compact was addressed to surface water.

on language of the Republican River Compact that does not appear in the Yellowstone River Compact.

Specifically, the Republican River Compact defined the "virgin water supply"—which is what that Compact allocated—as "the water supply within the Basin *undepleted by the activities of man*." Art. II, 57 Stat. 86, 87 (1943) (emphasis added). The Special Master viewed this language as crucial:

> To be noted first is the unqualified inclusiveness of the language defining what the Compact regulates: the "water supply within the Basin," not some of it, but all of it. And the water supply that is regulated is the "virgin" supply; that is, the full quantity of water in its natural state, "undepleted by the activities of man."

First Report of the Special Master (Subject: Nebraska's Motion to Dismiss), *Kansas v. Nebraska and Colorado*, No. 126, Orig., at 19-20 (Jan. 28, 2000). The Special Master explained further: "Any groundwater pumping that depletes the stream flow is an 'activity of man' by which the virgin water supply of the Basin is beneficially consumed, and therefore the depletion caused by that groundwater pumping must be reflected in the measurements of the virgin water supply and of consumptive use." *Id.* at 20-21.

By contrast, the Yellowstone River Compact contains no such broad requirement to allocate a "virgin" water supply within the Basin "undepleted by the activities of man." Rather than announcing as its purpose "the most efficient use of the waters of the [ ] River Basin," Republican River Compact, Art. I, 57 Stat. 86, the Yellowstone River Compact

explains that the signatory States adopted the Compact to "remove all causes of present and future controversy . . . with respect to the waters of the Yellowstone River and its tributaries . . .." Compl. App. A-1. As for the waters it actually allocates among the States, the Yellowstone River Compact is limited to the "unused and unappropriated waters of the Interstate tributaries of the Yellowstone River." Art. V.B. Thus, unlike Republican River Compact, the Yellowstone River Compact contains no definition of "water supply," and instead defines only the "Yellowstone River System" and "Interstate Tributaries" (and does so in terms expressly limited to surface waters). Nor does it contain any other provision forbidding activities that might deplete surface water in some other manner. While the Compact defines "beneficial use" as use of the water supply that depletes it (Art. II.H), the Compact regulates only "direct diversions for beneficial use."[6]

Moreover, the Republican River Compact allocated specific amounts of water, expressed in acre-feet for each affected drainage basin, with a special provision for increasing or decreasing allocations where future supply deviated from these amounts. Republican River Compact, Arts. III and IV, 57 Stat. 87-89. Allocations of specific quantities

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[6] Art. V.B. Article V.A. on which Montana relies, applies to "[a]ppropriative rights to beneficial uses," but only "of the Yellowstone River System," which is expressly defined in terms limited to surface water (*i.e.*, "the Yellowstone River and all of its tributaries, including springs and swamps"). As discussed above, the Compact describes "appropriation" as diversion from the river channel. *See* Arts. VII.C (appropriations adjudicated where "the water is diverted"), II.G ("diversion" involves taking of water from "the channel" of the Yellowstone River or of its tributaries).

are not even mentioned in the Yellowstone River Compact.

Also, the Special Master's Report on the Republican River Compact, while concluding that the Compact's language unambiguously covered groundwater, found that "if the language of the Compact were thought to be ambiguous, extrinsic evidence of the parties' intent leads clearly to the same conclusion." First Report of the Special Master (Subject: Nebraska's Motion to Dismiss), *Kansas v. Nebraska and Colorado*, No. 126, Orig., at 23. Specifically, the Special Master found that:

> [D]ocuments from the negotiation and drafting of the Compact demonstrate that the Commissioners who represented the compacting States were well aware (1) that groundwater diversion prior to its entrance into the stream flow can have the effect of depleting the virgin water supply and (2) that groundwater contributions to the virgin water supply would be allocated under the Compact.

Id. at 25. Montana, which has the burden of proof on the issue,[7] has not alleged that such evidence exists in this case. And the documents relating to the history of Compact negotiations and passage by the States and Congress (discussed in Part III *infra*) contain no reference to groundwater pumping or other concerns about depleting the water supply, other than by direct diversion of surface water.

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[7] *Kansas v. Colorado* ("*Kansas I*"), 514 U.S. 673, 693-94 (1995).

2. Arkansas River Compact

Montana also cites this Court's agreement with the Special Master's conclusion that the Arkansas River Compact was violated by "'[post-Compact] pumping in Colorado [that] caused material depletions of the usable Stateline flows of the Arkansas River.'" *Kansas I*, 514 U.S. at 693-94 (quoting Report of the Special Master at 263) (first alteration in text). However, the Arkansas River Compact contained a broad provision, Article IV.D, that the "waters of the Arkansas River . . . shall not be materially depleted in usable quantity or availability for use . . ." by future development or construction for purposes of water utilization and control. Art. IV.D, 63 Stat. 145, 147 (1949). The Special Master interpreted that provision to "protect . . . usable flows from material depletion caused by any increased consumptive use, including the construction of new wells or increased levels of pumping from precompact wells." Report of the Special Master, *Kansas v. Colorado*, No. 105, Orig., 1994 WL 16189353, at *45 (Oct. 3, 1994). This Court agreed, and relied on "the clear language of Article IV-D" to hold that Colorado's post-Compact pumping violated the Compact. *Kansas I*, 514 U.S. at 690-91. *See also Kansas v. Colorado ("Kansas II")*, 543 U.S. 86, 90-91 (2004). There is no comparable provision in the Yellowstone River Compact.

II. IN ALL EVENTS, THE COMPACT DOES NOT COVER GROUNDWATER THAT WOULD NOT NATURALLY REACH THE SURFACE SO AS TO AFFECT RIVER FLOW IN MONTANA.

The Complaint specifically targets groundwater use for irrigation and CBNG extraction. For the

reasons discussed above, we agree with Wyoming that neither type of groundwater use is covered by the Compact. Moreover, there is an additional reason to conclude that the Compact does not cover groundwater use for CBNG extraction where the groundwater would not naturally reach the surface so as to affect river flow in Montana.

As previously described, the Yellowstone River Compact defines "Tributary" as any stream that "contributes to the flow" of the Yellowstone River. Art. II.E. The Compact also defines the "Yellowstone River System" to mean the Yellowstone River and "all of its tributaries, including springs and swamps." Art. II.D. Springs and swamps, which are surface waters themselves, are apparently included because they contribute to the flow of the surface streams. And, as previously noted, the Compact applies to "appropriative rights" and "appropriations" that involve "diversion" from the channel of the river or of a tributary. Arts. V.A, V.B, II.G.

The argument might be made that "diversion" from a channel is involved when a person takes groundwater that would otherwise flow into the river stream. That argument was an important factor in *Kansas v. Nebraska*, where the Special Master concluded that "the Compact negotiators intended the Compact to regulate all the natural stream flow in the Basin, *including any groundwater contributions to that flow*." First Report of the Special Master (Subject: Nebraska's Motion to Dismiss), *Kansas v. Nebraska and Colorado*, No. 126, Orig., at 25 (emphasis added). We think that argument would be unsupported by the language of the Yellowstone River Compact because, as previously discussed, the Compact is limited to surface water

and differs markedly from the compact at issue in *Kansas v. Nebraska*.[8]

But even if such a broad reading of "diversion" were accepted, it would not cover water produced in association with CBNG. As previously described, typically water pumped during CBNG extraction would not naturally reach the surface of the Powder River in Montana, and thus would not affect Montana's rights under the Compact. *See N. Plains Res. Council*, 325 F.3d at 1158. Even a broad concept of "diversion" would not reach the CBNG operator pumping underground water that otherwise would not reach the river and be available in Montana for diversion.[9]

The conclusion that the Compact does not cover diversion of groundwater that would not naturally reach the river as it flows into Montana is confirmed by the Compact's definition of "beneficial use." (As previously noted, Article V.A, on which Montana relies, applies to pre-1950 "[a]ppropriative rights to the beneficial uses" of the waters of the Yellowstone River system.) "Beneficial Use" is defined as "that use by which *the water supply of a drainage basin* is depleted when *usefully employed* by the activities of

[8] Also, Article V.B regulates "direct diversions for beneficial use." Pumping groundwater that otherwise might eventually reach the stream is not a "direct diversion." Moreover, as previously noted, Article II.G defines diversion as taking water from the channel. Taking water than might eventually reach the channel is not the same thing as taking water from the channel.

[9] Indeed, to the extent that CBM pumping brings water to the surface that would not otherwise be available to Montana for diversion, Montana has no standing to complain under the Compact that it is being deprived of a sufficient river flow.

man." Art. II.H (emphasis added). The "drainage basin" is the Yellowstone River Basin, which the Compact defines as areas "drained by the Yellowstone River and its tributaries." Art. II.C. CBNG groundwater is not "drained by the Yellowstone River and its tributaries," if it "comes from deep underground aquifers [and] would not reach the ... river" if it were not extracted by the CBNG process. *N. Plains Res. Council*, 325 F.3d at 1158. And if the groundwater would not naturally reach the surface so as to affect river flow in Montana, Montana has no basis for claiming that its rights under the Compact have been violated by the process. Any other interpretation would be divorced from the purpose of the Compact to protect flows of surface water to Montana and North Dakota.

III. THE COMPACT DOES NOT CONFER ADDITIONAL PROTECTION ON PRE-1950 WATER RIGHTS.

Montana's claims would fail even if the Compact were read, notwithstanding its plain language to the contrary, to somehow cover all waters underlying the surface area of the Tongue and Powder River Basins. Montana's claims are premised on the notion that Article V.A of the Compact confers additional protection on pre-1950 rights against post-1950 uses, above and beyond the protection available under existing law. The plain language of Article V.A, however, confirms what the history (as discussed in Wyoming's brief) reveals. The drafters of the Compact assumed that there would be ample water to satisfy pre-1950 uses, and wrote the Compact to allocate the water they assumed would remain after pre-1950 uses were satisfied. By its terms, the Compact leaves the holders of pre-1950 rights to the status they enjoyed under prior law. The Compact's

effect is limited to allocation of the remaining waters among post-1950 rights and supplemental supplies for pre-1950 rights.

The language of Article V.A makes plain that pre-1950 rights would continue to be enjoyed under the existing law of appropriation, rather than acquiring new rights under the Compact: "Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Art. V.A. This provision clarifies that each State's pre-1950 rights to use the water of the Yellowstone River System "shall continue to be enjoyed" and is therefore not affected by the proportional appropriations of the "unused and unappropriated waters" of the river system provided for in Articles V.B and V.C. Article V.A itself does not guarantee that those pre-1950 rights will be satisfied, does not allocate any water to satisfy those rights, and does not provide any remedy in the event there is insufficient water to satisfy those rights.

Article V.A's language dealing with pre-1950 water rights stands in stark contrast to the language the drafters adopted in Articles V.B and V.C for the "unused and unappropriated" waters of the Yellowstone River System. There, the Compact does not merely recognize the State's rights to use those waters, it affirmatively allocates water between the States to be used for those purposes and provides for means of ensuring compliance with the Compact's allocation of those waters. *See* Art. V.B (providing that "the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950, . . . is allocated to each signatory

State" as provided); Art. V.C (providing that "[t]he quantity of water subject to the percentage allocations" of the Compact "shall be determined on an annual water year basis" pursuant to a specified formula). If the drafters had wanted to guarantee satisfaction of pre-1950 water rights or allocate waters for that purpose, they would have done so expressly. Montana has not alleged that Wyoming has used more than its proportional share of the waters actually allocated by the Compact in Articles V.B and V.C. It has therefore failed to state a claim upon which relief can be granted.

That the plain language of Article V.A does not guarantee adequate water to satisfy pre-1950 water rights is confirmed by the history of the Compact. The Senate Report on the final Compact included and relied upon the report to Congress of R.J. Newell, the United States' representative to the Yellowstone River Compact negotiations. Wyo. Mot. to Dismiss, App. 78. In explaining the negotiating and drafting history over many years that led to the final Compact presented to Congress, the Newell Report stated:

> In earlier attempts to arrive at a compact and in the early meetings here reported, there was searching discussion as to whether the agreement sought on division of waters should include the water now appropriated and in use or should apply only to the unappropriated and unused balance which is available for further development. *The latter principle was decided on (art. V-A)* for several reasons. First, it would be a huge and time-consuming task to determine and

> fix comparable values for existing rights in three States with differing water laws and practices in establishing water rights. Second, the basic fact that there is enough water if properly conserved by storage to take care of all existing and all feasible future developments points up the importance of arriving promptly at the simplest workable agreement that would permit such storage projects to proceed.

Wyo. Mot. to Dismiss, App. 83 (emphasis added). The United States' representative to the Compact negotiations therefore affirmed in his report to Congress that Article V.A reflects a decision by the drafters that "the agreement sought on division of waters . . . *appl[ies] only* to the unappropriated and unused balance" of the waters, not to "the water now [*i.e.*, in 1950] appropriated and in use" by the signatory States. *Id.* (emphasis added). This report was relied upon and reprinted in the Senate report recommending ratification of the Compact.

In its report, the Senate Committee on Interior and Insular Affairs agreed with the Newell Report's assessment of Article V.A. It explained that under Article V.A, "[e]xisting appropriative rights as of January 1, 1950, are recognized in each of the signatory States," but that *"[n]o regulation of the supply is mentioned for the satisfaction of those rights."* Wyo. Mot. to Dismiss, App. 77 (emphasis added).

The House Report on the Compact reflects this same understanding. It explains that "[e]xtensive studies by an engineering committee, appointed by the commission to advise it, disclosed that little

could be gained, from a water-supply standpoint by attempting, in the compact, the regulation and administration of existing appropriative rights in the signatory States." Wyo. Mot. to Dismiss, App. 71. "Accordingly," the House Report continues:

> paragraph A of article V recognizes the appropriative rights to the beneficial uses of the water of the Yellowstone River system existing in each signatory State as of January 1, 1950, and it permits the continued enjoyment of such rights in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

Id. Thus, the House Report also confirms that while Article V.A "recognizes" pre-1950 water rights and "permits" the continued enjoyment of those rights, it does not "attempt[] . . . the regulation and administration" of those rights. *Id.*

The text and history of Article V.A therefore make clear that the Compact does not provide enforceable rights to or otherwise guarantee the satisfaction of pre-1950 water rights. The drafters of the Compact assumed that, with the construction of proper storage facilities, there would always be adequate water in the Yellowstone River System to satisfy pre-1950 water rights, and still have an adequate remainder of unused and unappropriated waters to provide for foreseeable future beneficial uses. Because of that assumption, and because all parties concerned were principally motivated by the need to complete the various water storage projects then-envisioned, the drafters elected to omit from the Compact any express guarantee, regulation, or

appropriation of water with regard to pre-1950 water rights, and provided solely for the allocation of waters "unused and unappropriated" at that time. Art. V.B.

In 1949, Texas and New Mexico signed a Compact for the Pecos River that contained a clause Montana now wants the Court to read into the Yellowstone River Compact. The Pecos River Compact provided that "New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition." *Texas v. New Mexico*, 462 U.S. 554, 559 (1983). The Court explained the background of this provision: "the Pecos barely supports a level of development reached in the first third of this century." *Id.* at 557. Thus, "[i]f development in New Mexico were not restricted, especially the groundwater pumping near Roswell, no water at all might reach Texas in many years." *Id.*

By contrast, the drafters of the Yellowstone River Compact, signed just two years later, thought there was ample water to support continued development in Wyoming and Montana. Thus, they did not include a "no depletion at the state line" clause, as was used in the Pecos River Compact.

If in fact, as Montana alleges, the assumption about the adequacy of the Yellowstone River System to satisfy pre-1950 water rights and provide for the allocation of other waters specified in the Compact is no longer accurate—if, in short, the Yellowstone River Basin has reached the point the Pecos River apparently reached 60 years ago—the proper response is to return to negotiations to provide for a

mutually acceptable allocation for those rights in light of the changed circumstances. Instead, Montana asks this Court now to read into the Compact a guarantee that is nowhere present in the language of the Compact and that the history of the Compact makes clear the drafters never envisioned. *See, e.g., Kansas v. Colorado*, 533 U.S. 1, 20 (2001) ("*A compact is a contract.* . . . '[It] must be *construed* and *applied in accordance* with its terms.'") (quoting *Texas v. New Mexico*, 482 U.S. 124, 128 (1987)) (emphasis in text); *Arizona v. California*, 373 U.S. 546, 565 (1963) (holding that "courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress"). In all events, Montana's Bill of Complaint should be dismissed.

CONCLUSION

This Court should grant the State of Wyoming's Motion to Dismiss the Bill of Complaint.

Respectfully submitted,

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